Supreme Court, U.S.
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In The

Supreme Court of the United States

EDWARD O.C. ORD,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Do United States District Courts have subject matter jurisdiction and the related inherent authority to issue an injunction to freeze the assets of a nonparty on behalf of the Securities and Exchange Commission where the nonparty has not been charged with any wrongdoing?

2) Does a United States District Court violate due process by ordering that a nonparty to a securities fraud action deposit with the court assets that have not been proven to be the fruits of the allegedly illegal conduct and where the party has not been served, or made a party to the civil action?

3) Can a civil doctrine of *res judicata* be applied to summarily dismiss an action in equity to set aside a judgment as void where the prior judgment was based on improper and untimely service – service occurring only after the requested order had already been entered by the Court – the mover was never made a party where the nonparty against whom the doctrine is sought never got a fair opportunity to litigate the issues in the prior action because of the faulty service, and where the later civil equity action to set aside the judgment is deemed to be a continuation of the prior action?

PARTIES TO THE PROCEEDING

There are no parties to this action other than those listed on the cover of this Writ petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edward O.C. Ord, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (*Ord v. Securities and Exchange Commission et al.*, No. 03-5312, Aug. 25, 2004) is not published, but is attached as Appendix B. Petitioner petitioned the Court of Appeal for a rehearing or rehearing en banc. On December 21, 2004, the Court denied Petitioner's petition. A copy of that denial is attached as Appendix A. The opinion of the District Court (*Ord v. Securities and Exchange Commission et al.*, No. 01CV02165 (EGS), Sept. 16, 2003) also was not published, but is attached as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (Court of Appeals) was entered on August 25, 2004. (See Appendix C.) The Court of Appeals denied a timely petition for rehearing on December 21, 2004. (See Appendix A.)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Rule of Civil Procedure 60(b)(6) provides in relevant part:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representatives from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void, . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

Preceding Litigation

The background of this case is complex, involving three separate civil actions, filed in two different district courts. Presented in this petition is an abbreviated statement of the case.

In February 1994, Respondent Securities & Exchange Commission (SEC) initiated *Securities & Exchange Commission v. Banner Fund International, et al.*, Civil Action No. 94-CV-342, against defendants Swiss Trade, Banner Fund, Lloyd Winburn, and others in the United States District Court for the District of Columbia below (District Court). The appellate decision in this action is reported at 211 F.3d 602 (D.C. Cir. 2000).

On March 7, 1994, U.S. District Judge Greene entered an *ex parte* preliminary injunction freezing the defendants' funds. In fall 1994, Swiss Trade & Commerce Trust and Lloyd Winburn retained Attorney Edward O.C. Ord (Petitioner) in California to represent them. During October and November 1994, Winburn directed the wire transfer of $99,985 into Petitioner's trust account. Winburn assured Petitioner, orally and in writing, that none of the funds were investor funds, and that they were entirely his own private funds. The funds were deposited subject to a vested California attorney's lien.

Upon learning of the injunction (well after he received the funds), and in compliance with its language, Petitioner took care not to transfer or use any of the funds. Every cent received by Petitioner remained in an interest-bearing trust account and ultimately was deposited in the registry of the District Court, based on an October 10, 2000, order issued in a separate civil action contempt proceeding. However, the funds were owed to and belonged to Petitioner. Judge Green's Preliminary Injunction neither suggested nor required Petitioner to notify anyone about the funds or to transfer the funds. To do so, might have subjected Petitioner to a malpractice claim or State Bar disciplinary proceedings.[1]

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[1] California Business & Professions Code §6068(e) provides that every licensed attorney shall "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." This rule is so uniquely absolute that, only as of July 1, 2004, an attorney may, *but is not required*, to warn of criminal acts that may result in great bodily harm or death. Currently, the California State Bar is refusing to recognize SEC rules requiring California lawyers to report certain client activities and warning State Bar members that if they comply, they will be disciplined. (*See* Amendment of §6068(c); and

(Continued on following page)

Petitioner *never* appeared in the District Court as attorney on behalf of anyone. During summer 1995, Petitioner attended two status conferences in *SEC v. Banner Fund*. Attorney Martha Echols appeared at these hearings as counsel of record for Swiss Trade and Winburn. At those status conferences, Petitioner asked the District Court to allow him to appear stating that he would do so if the Court released some of the funds deposited in his trust account for payment of his attorney fees. The District Court refused his request, but it did encourage Petitioner to enter an appearance, stating it would rule at the end of the case on his request for fees , and the Court said it had never disallowed attorneys' fees in the past in these situations. Petitioner never entered an appearance, and Echols remained counsel of record for Swiss Trade and Winburn.

Petitioner is owed considerable attorney's fees for his work in 1994 and 1995, as well as considerable costs for travel and other expenses. Petitioner has not been paid any of his billed attorney's fees and costs. Petitioner has always abided by the terms of the issued injunction. Petitioner maintains, however, that the injunction is void and that his receipt in good faith of the funds subject to the vested lien gives his claim priority.[2]

In April 1996, the SEC brought a civil action in the United States District Court for the Northern District of

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Charles S. Doskow, "Clash Between State Bar Rules and Rules of SEC Puts Attorneys in Bind," S.F. Daily Journal, January 29, 2004 at p. 5.)

[2] Some of the funds plus interest may be more than the lien amount. This remains a genuine issue of fact.

California (Northern District), entitled *SEC v. Banner Fund International et al.*, CV-96-0048 MISC (MHP). The SEC moved to compel Petitioner's compliance with a subpoena duces tecum to produce bank records involving clients. Petitioner retained California attorney Laura Woodward *only to advise him* concerning this motion. *Woodward never entered an appearance for Petitioner in the SEC's action in the Northern District nor in any other matter.*

Petitioner did not oppose the SEC's motion to enforce the subpoena. In November 1996, the Northern District issued an order enforcing the subpoena, and Petitioner immediately complied.

On March 26, 1998, the District Court in *Banner* granted the SEC's motion for summary judgment against Swiss Trade and Winburn. Petitioner was not served with the motion for summary judgment, the order entering summary judgment, nor the final judgment. In December 1998, the SEC filed a memorandum of points and authorities for entry of a mandatory injunction against Petitioner in the D.C. Banner fund litigation requiring him to deposit into the D.C. District Court the money sent to him for attorney fees and terminating any right Petitioner had in the funds. The SEC incorrectly contends that this document initiated "summary proceedings." No plenary civil action complaint and summons were ever filed in D.C. and served on Petitioner. No motion, declaration or any other pleadings was ever served on Petitioner.

On April 7, 1999,[3] the District Court, unaware that Petitioner had not been served with any of the filings,

[3] See Appendix "F" for a copy of the April 7, 1999, order.

entered the requested injunction without notice to Petitioner, and without a motion supported by admissible evidence, hearing, or trial on the merits, and without findings required under Fed. R. Civ. P., Rule 52(a). The SEC incorrectly claims it "served" Petitioner by serving one document on attorney Woodward. But she had never appeared as the attorney of record for Petitioner in any action. She provided legal advice only to Petitioner nearly three years prior to the date the SEC "served" papers on her. The SEC acknowledged that Petitioner never authorized Woodward to accept service for him, and that she never told them that she was his agent for service. Petitioner was not given notice despite the fact that the SEC had his address, which it utilized to serve him, via process server to sue him for the bank records and with papers well *after* it had obtained an order terminating his rights.

The SEC also failed to serve its "Reply" memorandum on Petitioner, where SEC said it was replying to "nothing" because no opposition had been filed in seeking the April 7, 1999 order. The SEC was aware that Petitioner claimed an interest in the funds held by him, and knew that he had not responded. The SEC should have realized he was unaware of its *ex parte* "memorandum." The SEC has never given a credible explanation for its failure to serve even the incomplete moving papers on Petitioner seeking to terminate his interest in his property. Also, it has never provided a credible explanation as to why it did not file a notice of motion and supporting admissible declarations, or file a separate plenary civil action as required under the Federal Rules and serve the non-party Petitioner.

Tacitly admitting a defect in service (actually no prior service), on June 2, 1999, and using a process server, the SEC personally served Petitioner with its memorandum of

points and authorities in support of the April 7, 1999 entered order. Thus, the "moving" papers were served only after the order (which the moving papers sought) had been entered and just as the appeal time was expiring. Upon receipt (in June 1999) of the April 7, 1999, order, Petitioner immediately requested that the SEC provide him with evidence that the funds held by him were investor funds. The SEC has never done so.

The SEC took the unfounded position that because Woodward "represented" Petitioner in the action filed in the Northern District of California, she somehow became his attorney of record in the action filed in the District Court three years later. The SEC therefore served the "memorandum" on Woodward, but not on Petitioner. This assumption flies in the face of established law and procedure. Woodward was not authorized to accept service on Petitioner's behalf, and she told the SEC she was not so authorized. Woodward was *not* the attorney of record for Petitioner *in any action*, not even in the action filed in the Northern District of California.

Immediately after receiving the April 7 order in June 1999, Petitioner instituted in the Northern District an independent equity civil action.

After the SEC instituted a contempt proceeding against the Petitioner, the SEC sought a contempt order in early October 2000 to hold the Petitioner in contempt by his out-of-the-presence-of-the-Court actions in not complying with the April 7, 1999 order. Instead, on October 10, 2000,[4] the D.C. District Court issued a second order directing

[4] See Appendix "G" for a copy of the October 10, 2000, order.

Petitioner to remit the frozen funds to the Court's registry, and threatening Petitioner with contempt if he did not do so. Pursuant to Supreme Court rulings, and to moot the separate[5] contempt proceeding, Petitioner deposited the money as ordered. He did not appeal this order as compliance with the order in the separate contempt proceeding simply mooted the contempt proceeding.[6] Petitioner continued to litigate the civil action to set aside the April 7, 1999 order.

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[5] A contempt proceeding based on actions occurring outside the immediate presence of the court is a separate civil action. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827, 833-34 (1994), defining the difference between direct and indirect contempt, and stating that "summary adjudication of indirect (out-of-court) contempt is prohibited." This Court required a separate due process trial on out-of-court conduct. Also see the Fed. R. of Civ. P., Rule 1, which states the federal rules apply in all civil actions of any nature in law or in equity except as stated in Rule 81. Rule 81 does not exempt contempt proceedings from the rules, including Rule 2 requiring a separate civil action and complaint.

A court under Rule 81 can accelerate a civil action to a further stage, i.e., allowing an *ex parte* application to show cause to be considered a complaint. However, a court cannot dispense with the rules requiring the service of the show-cause complaint and service of process under Rule 4, discovery, and an evidence trial prior to the court entering a decision and order judgment. *See Donaldson v. United States*, 400 U.S. 517, 536-37 (1971). The SEC did not comply with any of these requirements.

[6] The order of October 10, 2000, states that Petitioner's motion to stay the contempt proceedings was denied. However, in the four plus years since that order was entered, there have been no contempt proceedings, none are on calendar, and Petitioner knows of no plans by the District Court to, in fact, hold such a hearing. Further, the Order of October 10, 2000, was merely an Order directed at Petitioner for him to comply with its previous Order entered April 7, 1999. The Order of April 7, 1999, is the Order that Petitioner has continually sought to overturn on due process and other grounds.

Petitioner has been a resident of California since 1971. He maintains a law office in San Francisco. In the District of Columbia, Petitioner does not: (a) own real property; (b) rent an apartment or other real property; (c) maintain an office; or (d) and generally does not have any ties or connection, except being an inactive member of the D.C. Bar.

Current Proceedings Below

On or about June 9, 1999, after being served with the April 7, 1999 order, Petitioner instituted a civil action in the Northern District containing four counts, sworn to under 28 U.S.C. §1746. This independent equity action was brought under common law equity concepts and Fed. R. Civ. P. Rule 60(b) to: (a) determine that the District Court's April 7, 1999 order is void because the District Court lacked judicial authority to act; (b) determine that the District Court's April 7, 1999 order is void because it was entered without according Petitioner due process, including the right to notice and a right to be heard; (c) prove the SEC's actions were inequitable; and (d) enjoin the SEC from continuing to violate Petitioner's constitutional rights and curb the SEC's illegal acts. The Northern District filing was based on the law of three circuits holding that to set aside a judgment, an independent civil equity action may be filed in a District Court, other than the District Court that issued the judgment, provided that it is where the plaintiff resides and personal jurisdiction can be obtained over the defendant. See 11 Wright & Miller, *Federal Practice and Procedure*, §2865 n. 2 & 3 (West 1995).

Ruling on Respondent's motion, on November 2, 1999, the Northern District dismissed Petitioner's action for lack of jurisdiction, and indicated Petitioner should re-file in the District Court for the District of Columbia. The Ninth Circuit affirmed. Those courts never passed on the merits of Petitioner's civil action. See Appendix E for a copy of the Ninth Circuit's unpublished opinion.

On October 19, 2001, Petitioner brought the action that is the subject of this writ petition in the District Court. It is basically the same action he brought in the Northern District.

On July 24, 2002, Respondents filed a motion for summary judgment asserting that: (a) District Court lacked subject matter jurisdiction based on sovereign immunity; (b) Petitioner waived his rights by failing to appeal the April 7, 1999 order entered in the *Banner Fund* case, which was now allegedly *res judicata*; the order mooting the contempt proceeding; and (c) that Petitioner's plead and sworn-to allegations were without merit. Petitioner filed an opposition to Respondents' motion,[7] including numerous objections to the evidence submitted by Respondents to support the summary judgment motion. Petitioner clearly showed that the "evidence" was rife with wholly inadmissible hearsay, speculation, lack of foundation, etc. There was no admissible evidence to support the summary judgment motion, and genuine issues of fact continued to exist. The District Court never ruled on Petitioner's evidentiary objections. On March 21, 2003, the

[7] In opposing the motion for summary judgment, Petitioner attached to his opposition a copy of the civil action complaint, sworn to under penalty of perjury, filed in the Northern District civil action.

District Court granted Respondents' motion for summary judgment, resolving all of the fact issues in favor of the SEC on the merits.

Petitioner filed a timely appeal of the summary judgment and dismissal to the D.C. Court of Appeals. Respondents moved for the extraordinary, rare relief of summary affirmance of the District Court's judgment. On August 25, 2004, the Court of Appeals granted the motion for summary affirmance in a terse, two-page opinion, even though the prior Appellate Court in the Ninth Circuit allowed a full appeal, including oral argument. (See Appendix B.) Petitioner filed a motion for rehearing on October 1, 2004. The Court of Appeals denied that motion on December 21, 2004. (See Appendix A.)

REASONS FOR GRANTING WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS AND THE DECISIONS OF OTHER CIRCUITS REGARDING THE LACK OF ANY SUBJECT MATTER JURISDICTION OF A DISTRICT COURT AND ANY RELATED POWER TO ISSUE AN INJUNCTION TO FREEZE THE ASSETS OF A NONPARTY ON BEHALF OF THE SECURITIES AND EXCHANGE COMMISSION.

In *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992), the court held that the U.S. district courts lack subject matter jurisdiction and any related power under the securities laws to enter a preliminary injunction to freeze the assets of a *nonparty* on behalf

of the SEC, where the nonparty has not been charged with wrongdoing. This holding was followed by the Third Circuit in *SEC v. Black*, 163 F.3d 188, 196-197 (3rd Cir, 1998). In that case, the court upheld a District Court lifting of a freeze on the assets of third parties noting that in no case has the SEC been granted an *ex parte* freeze of assets where those assets were anything other than property, or deemed property, of a defendant or of a culpable third party.

The court in *Black* distinguished the SEC's position from the line of cases beginning with *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) [establishing the rule that assets of third parties cannot be frozen unless it is shown that the third parties are culpable or that the assets are controlled by the defendants]. The court found that in those cases the assets were clearly controlled by or meant for the culpable defendants. Not so in the instant case. The assets frozen by the District Court in *SEC v. Banner Fund* were Petitioner's, paid to him by Lloyd Winburn as an advance fee for legal services, received in good faith without knowledge of any freeze order, and subject to a vested attorney's lien. Petitioner presented sworn evidence to support his contention that the funds were from Lloyd Winburn's personal funds and were not investor funds, and were received in good faith without knowledge of any freeze order. The SEC never offered any admissible evidence that these funds were investor funds even though the SEC had this initial burden of proof.

By summarily granting the SEC's *ex parte* request to have Petitioner deposit into the Court's registry the funds given to him as a legal services advance fee, to which an attorney's lien had attached, and forfeit any claims, the District Court has placed itself in direct conflict with the

Courts of Appeal in *Cherif* and *Black*. The Ninth Circuit has recently come down on the side of the District Court. See *SEC v. Hickey*, 322 F.3d 1131 (9th Cir. 2003), *amended*, 335 F.3d 834 (2003). In that case, the court upheld the freeze of assets of a real estate brokerage wholly owned by the defendant's mother as part of equitable enforcement of a contempt order. The court based its ruling on the district court's "inherent power" to "give necessary relief" in securities cases.

Hickey shows that there is confusion about and a clear split among the Federal Circuit Courts of Appeal regarding the subject matter jurisdiction of the District Courts to issue injunctions to freeze assets in the hands of third parties. This is a very important enforcement issue that this Court should decide. Nonparty citizens should not have their assets forfeited depending upon the Circuit where they reside.

In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-333 (1999), this Court held that District Courts lack inherent power to issue a preliminary injunction to freeze the assets of a party or a third party where such a remedy was historically unavailable from a court of equity. See also, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-111 (1969), stating that courts take a dim view of imposing liability where the individual or entity that will be forced to assume the obligations of another and has not been made a party to the proceedings. *Hickey* and the court of appeal below is in conflict with all of the above-described rulings, and have employed legal fictions inconsistent with this court's holding in *Grupo*, and they are also inconsistent and in conflict with the Circuit Court opinions both in *Cherif* and *Black*.

To settle a conflict between the circuits, with *Hickey* and the D. C. Circuit below taking one position, whereas the courts in *Cherif* and *Black* take a different position, it is important for this Court to bring clarity and uniformity to this important and often utilized area of securities law.

In this type of scenario, which is prevalent in SEC enforcement cases, what is fundamental fairness? What are the rights of a nonparty? What must be done and shown before assets in a nonparty's possession may be frozen and/or seized and/or forfeited? What due process rights are afforded to a nonparty? Only this court can provide a definitive answer, and Petitioner respectfully submits that this case offers an attractive tool for so doing.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW VIOLATES RULES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS ESTABLISHED AND CONTINUALLY ENFORCED BY THIS COURT.

The proceedings below contravened this court's ruling in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) and in doing so violated the rules of due process and fundamental fairness on which that decision was based, and violated the Fifth Amendment of the United States Constitution, which guarantees that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

In *Nelson*, a post-judgment motion was brought to make an unserved non-party a third-party defendant and to immediately amend the judgment to create liability on the part of the non-party. Nelson's counsel argued and this Court agreed, that "[I]t's legally wrong to subject the

individual, nonserved, nonsued, and nonlitigated-against person to liability for that judgment. Because there are [civil procedure] rules. The rules say that if you want a judgment against somebody, you sue them, you litigate against them, you get a judgment against them." 529 U.S. at 470. This Court indicated that a party must follow all of the rules to get a judgment. *Id.* at 470, n.4. Paraphrasing *Nelson*, the law does not allow judgment against a person to stand simply because he might be liable had he been charged and afforded due process. Instead, he is entitled to due process of law and a trial on the merits. *Id.* at 471-472.

Herein, the Court of Appeals' affirmance rewarded the government's failure to follow any of the rules to obtain an order. Petitioner was never a party to the underlying litigation (*SEC v. Banner Fund*). His sole contact with the litigation was to give advice to the defendants in California and to make informal requests to the District Court at two status conferences. The government completely failed to follow any of the rules required to bring him before the District Court and the lower courts acquiesced in this violation of Petitioner's due process rights. Petitioner never was able to contest the government's claim that the funds given to him by Winburn were illegally obtained investor funds or that due to his good faith receipt and the attorney's lien, the funds belonged to him. Petitioner never got his day in court as guaranteed by the Fifth Amendment.

The Seventh Circuit in *Cherif* provided a clue as to the proper procedure in such third-party asset freeze cases by stating that a court presiding over a securities fraud case has no authority to freeze the assets of a nonparty against whom no wrongdoing was alleged until it establishes that the assets were proceeds from securities laws violations. (933 F.2d at 413-414.)

Due process and fundamental fairness required that the government must bring a new action against Petitioner, join him as a party, or name him as a "nominal" defendant. It did none of these. Proper service and notice were prerequisites to obtaining a valid order. After-the-fact "service" was wholly insufficient and violated Petitioner's right to due process. There was no notice, no ability to contest the government's position, and no trial or hearing. These are the requirements of due process on which our judicial system is built and that are guaranteed by the Fifth Amendment.

The government's failure to properly bring Petitioner into the *SEC v. Banner Fund* litigation as a party and show any misconduct resulted in the District Court lacking judicial authority to act against the Petitioner due to a lack of personal jurisdiction. This lack of personal and subject matter jurisdiction and related voidness was one of the grounds of Petitioner's Fed. R. Civ. P. 60(b) action. There is no time limit under Rule 60(b) for this ground. See *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 22 (1st Cir. 1992); and see generally, 11 Wright & Miller, *Federal Practice and Procedure* §2862 n.3 (West 1995), and the cases cited therein.

Another violation of fundamental fairness and of this Court's prior rulings occurred when the Court of Appeal used Petitioner's compliance with the unappealed October 2000 (OSC) order in a separate contempt proceeding as a basis for summarily affirming the District Court's summary judgment. This Court has ruled that the proper course of action in response to the threat of contempt is to comply and cite the prior order as reversible error should an adverse judgment result. See *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *United States v. United Mine Workers*

of America, 330 U.S. 258, 294 (1947). Also instructive is *United States v. Armstrong*, 781 F.2d 700, 707 (9th Cir. 1986). This is exactly what Petitioner did, except the contempt proceeding was a separate proceeding and compliance simply mooted the contempt proceeding. There was no order to appeal and this Court has held that when one complies with an OSC re contempt order and then litigates the prior order, he may appeal the order. That is, it is not necessary to be held in contempt on penalty of not being able to appeal or contest the underlying issue.

Petitioner was seeking to set aside the first crucial order in *Banner* under Rule 60(b) and equitable principles in the continuing *Banner* proceeding. Amazingly, the Court of Appeals has denied Petitioner his day in court on the equitable and Rule 60(b) action because he did not appeal the contempt order in the separate contempt proceeding that mooted contempt as a result of that compliance, along with the original final judgment.

The position that Petitioner should have appealed the OSC re contempt to deposit the funds in the District Court's registry is without any legal merit. The OSC did not determine ownership of the funds, and hence there was no reason to appeal. Petitioner, by depositing the funds into the Court's registry, did not forfeit his claim of ownership, and compliance with the District Court's OSC did not equate to forfeiture of, or determination of, ownership adverse to Petitioner. That issue remained to be determined as Petitioner had pending a civil action in the District Court. The District Court's Order of April 1999, which is the Order that Petitioner has sought to challenge throughout, is the sole order which purportedly determined ownership, although the District Court entered that order without Petitioner being given any notice and served

with a motion, and it was entered without any opportunity for Petitioner to be heard. "Notice" came only after the District Court had granted the SEC's request by entering the April 7, 1999, Order.

This summary affirmance is contrary to the Appellate Court's prior decisions that the first judgment order in the proceeding determining rights is the one that counts. If that order judgment is reversed, any second order is also automatically reversed. *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962) [holding that if the first order is void under Rule 60(b), so is the second; and setting aside the first default judgment after four years.]

Again, the second order was in a separate contempt proceeding seeking to compel compliance with the first order. The compliance simply mooted the contempt proceeding, follow the course of conduct ordered by this Court, and was not res judicata with respect to the first judgment being appealed.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW MISAPPLIES PRINCIPLES OF RES JUDICATA, IN THE MIDDLE OF A CONTINUING PROCEEDING AS DEFINED BY THIS COURT TO TERMINATE IMMEDIATELY THE CONTINUING PROCEEDING.

The D.C. Court of Appeals gave only one reason for granting summary affirmance of the District Court's ruling – that *res judicata* barred Petitioner from re-litigating issues that were supposedly already litigated in the prior litigation, specifically, the April 1999 order, which was served just as the appeal time expired and the October 2000 order

in the separate contempt proceeding of the District Court in *SEC v. Banner Fund*.[8] This ruling ignores the fact that the Rule 60(b) proceeding treats the *Banner Fund* proceeding as continuing and not final. Consequently, *res judicata* does not apply at all. The ruling denies Petitioner due process of law, as guaranteed by the Fifth Amendment.[9]

As this Court has held, *res judicata* is not a mere matter of practice or procedure, it is a rule of fundamental and substantial justice. *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). The doctrine of *res judicata* rests on the ground that the party to be affected has litigated, or has had the opportunity to litigate, the same matter in a former action in a court of competent jurisdiction. See, generally, *Heiser v. Woodruff*, 327 U.S. 726 (1946), *reh. denied*, 328 U.S. 879 (1946). Thus, this Court has established an exception to the application of *res judicata* where the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case. See *Allen v.*

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[8] The government also contended that sovereign immunity barred Petitioner's action. However, because the Court of Appeals never mentioned sovereign immunity in its summary affirmance, we assume the court agreed it was not applicable in seeking to set aside a judgment in a civil action instituted by the U.S. This Court so held in *United States v. Beggerly*, 524 U.S. 38, 46 (1968).

[9] The Court of Appeal, by affirming the District Court, wrongly applied *res judicata* by finding it applicable where: (i) Petitioner was not served with any motion for the April 1999 Order until after the Order had been entered; and (ii) ignored that Petitioner was not given any opportunity to be heard prior to the District Court entering the aforesaid order. *Res judicata* is not applicable under such circumstances of fundamental violations of Petitioner's right to due process under the Fifth Amendment.

McCurry, 449 U.S. 90, 95 (1980); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

The doctrine of *res judicata* is predicated on the existence of a valid judgment; a judgment that is null and void may not be used as a basis for its application. See *Hoag v. New Jersey*, 356 U.S. 464 (1958), *reh. denied*, 357 U.S. 933 (1958) (*and overruled in part on other grounds in Ashe v. Swenson*, 397 U.S. 436 (1970)); and *Shepherd v. Pepper*, 133 U.S. 626, 648 (1890). A court lacking jurisdiction may not be the basis for the application of the doctrine of *res judicata*. See *Computer Assoc. v. Altai, Inc.*, 126 F.3d 365, 370 (2nd Cir. 1997), *cert. denied*, 118 S.Ct. 1676 (1997), holding that lack of personal jurisdiction over a party in the first action left that party free to pursue a second action. Other courts have held that improper service or lack of notice in a first action can be the basis for declining to give *res judicata* effect to the judgment of that action. See, for example, *Horwitz v. Alloy Automotive Co.*, 992 F.2d 100, 104 (7th Cir. 1993); *Tutt v. Doby*, 459 F.2d 1159 (D.C. Cir. 1972).

Based on these fundamental principles, the District Court's judgments and the two orders from the *SEC v. Banner Fund* litigation cannot form the basis for the application of *res judicata* to Petitioner's current action. First, the orders were null and void because the District Court lacked subject jurisdiction and personal jurisdiction based on the government's failure to serve nonparty Petitioner with a plenary civil action summons and complaint under Fed. R. Civ. P., Rules 2 and 4. In the alternative, the failure to serve the proper moving papers until after the requested Order had already been entered, denied Petitioner notice and a right to be heard. The government's disingenuous claim that service of the

incomplete moving papers was made on Attorney Woodward is without merit based on fundamental principles of fairness. See, for example, *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927), stating that no person has the right to appear as another person's attorney without the other's authority. See also, *Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092 (2nd Cir. 1990), holding that service on a party's attorneys was improper where there was no dispute that the party had not authorized its attorneys to accept service. To the same effect, see *Industrial Indemn. Co. v. Harms*, 28 F.3d 761 (8th Cir. 1994); *McKenzie v. Lunds, Inc.*, 63 F.Supp.2d 986 (D.Minn. 1999) (holding that service for a new civil action cannot be accomplished by serving the summons and complaint on the attorney for the defendant in a prior action); *In re Four Seasons Securities Litigation*, 63 F.R.D. 115, 122 (D.Okla. 1974). The authority is to be very specific. See *Royal Swan Navigation Co. Ltd. v. Global Container Lines, Ltd.*, 868 F.Supp. 599, 602 (SDNY 1994).

In this case, Petitioner never authorized Woodward to accept service for him in the *SEC v. Banner Fund* litigation, or in any other case. Moreover, the *Banner Fund* on which Petitioner had consulted with Woodward occurred three years earlier. The government knew where Petitioner was or easily could have found his address through his law firm. The decisions below reward the government for not doing its homework, while eviscerating Petitioner of any right to receive notice and to be heard.

Petitioner never had an opportunity to litigate any of the issues. First, Petitioner received the funds in good faith without knowledge of the injunction. See *Alioto v. United States*, 593 F.Supp. 1402, 1410-12 (N.D.Ca. 1984),

holding that if funds are received by an attorney in good faith without knowledge of any claim, he can keep the funds. Second, whether the attached California attorney lien allows Petitioner to keep the funds to the extent of his fees. See Cal.Civil Code §2881; *Bluxome Street Associates v. Fireman's Fund, Inc.*, 206 Cal.App.3d 1149, 1153-54 (1988) [attorney lien covers past and future legal services.] Third, whether the funds given to him by Winburn were investor funds (as the government asserted), or private funds, as Winburn had assured him. Therefore, the injunction would still not freeze the funds even if there was subject matter jurisdiction.

Petitioner re-filed his independent equity action including Rule 60(b) grounds[10] in the District Court and the SEC moved for summary judgment. Petitioner objected to each piece of evidence presented by the government on this issue, and presented sworn evidence to support his claim the funds were not investor funds. The District Court never held an evidentiary hearing and never ruled on these fundamental evidentiary objections. Yet, without any admissible facts, the District Court granted summary judgment by resolving all fact issues in favor of the SEC on the merits for the SEC. How could the District Court determine its authority to freeze the assets when it failed to make the initial, mandatory ruling that the assets were fruits of the allegedly illegal conduct? How could the Court

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[10] This Court has held that the very Rule 60(b) grounds raised here, including (b)(6), can be raised in an independent equity civil action. See *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Rule 60(b) is a grand reservoir of equitable power to do justice in a particular case. *Radack v. Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963).

rule the funds were investor funds when the only evidence in the record was that the funds were private funds?

Petitioner was served with the April 1999 order just as it became final, with no reasonable opportunity to appeal it. How can this be called fair and be used as a valid basis for precluding Petitioner from challenging that judgment in a later action?

Res judicata cannot apply to any order because of Petitioner's Rule 60(b) equity action. This equity action was a continuation of the same *SEC v. Banner Fund* litigation. An independent civil equity action to set aside a judgment is deemed a continuation of the prior action brought by the United States. See *United States v. Beggerly*, 524 U.S. 38, 46 (1998). In *Beggerly*, this Court cited an 1884 Supreme Court decision holding that an independent equity action seeking to set aide a judgment based on a settlement agreement was ancillary to the prior civil action and a continuation of that proceeding. See also, *Charles Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 761-62 (6th Cir. 2002), following *Beggerly*. Although in *Beggerly*, the Court ultimately held that setting aside an out-of-court settlement did not fall within the scope of an action to set aside the judgment, the continuity of the proceeding ruling does apply here and mandates acceptance and review.

CONCLUSION

This case is not about the government's ability to enforce the securities laws and wrest the fruits of illegal activities from the hands of third parties where the wrongdoers sought to secrete it from the government. This

case, as this petition shows, is about the judicial power (or lack thereof) of the District Court to freeze assets of nonparties who are not wrongdoers and fairness in the judicial system. Should the government be allowed to use the courts as its tool to freeze any assets of an alleged participant in a securities fraud that are in the hands of third parties, even if the third party has a legitimate claim to those assets and the government has not proven that the assets were the fruits of the alleged illegal conduct? Should the federal courts sanction this government behavior by ignoring almost all of the fundamental rules of due process and fairness?

Petitioner is seeking his day in court, no more and no less. He is entitled to the same rights as any other litigant in federal courts – the right to fair notice and an opportunity to be heard. The courts below denied him these rights by exceeding their authority and ignoring the constitutionally guaranteed right to due process of law.

The actions of the courts below raise important issues that bring to light a split among circuits on the judicial power of the District Courts in one very important area of governmental enforcement and a fundamental issue of fairness in federal court litigation procedure. This is an important issue that the Court should now resolve. By granting this petition, the Court can bring uniformity among the circuits as to the authority of district courts to freeze assets in the hands of nonculpable third parties. The Court can also reaffirm that judgments cannot be rendered without providing parties with notice and an opportunity to be heard, that equitable actions involving Rule 60(b) are a continuation of the prior proceeding to set aside a prior unappealed judgment, and reaffirm that the doctrine of *res judicata* is to be applied fairly to judgments

that meet all standards for fairness and comply with fundamental due process requirements.

Accordingly, Petitioner, Edward O.C. Ord, respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 035312 **September Term, 2004**

01cv02165

Filed On: Dec. 21, 2004

Edward O.C. Ord,
Appellant

v.

Securities and Exchange Commission and
United States of America,
Appellees

BEFORE: Sentelle, Henderson, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed October 1, 2004, and the supplement thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 035312 **September Term, 2003**

01cv02165

Filed On: Aug. 25, 2004

Edward O.C. Ord,
Appellant

v.

Securities and Exchange Commission and
United States of America,
Appellees

BEFORE: Sentelle, Henderson, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; the Rule 28(j) letter; and the motion to exceed page limitation, it is

ORDERED that the motion to exceed page limitation be granted. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). This appeal stems from a complaint for "independent action, injunctive relief, and declaratory relief" regarding two prior district court orders from which appellant did not appeal, *SEC v. Banner Fund International,*

No. 94cv342 (D.D.C. Apr. 7, 1999) (order directing plaintiff-appellant to remit frozen funds to the district court's registry), and (D.D.C. Oct. 10, 2000) (order directing plaintiff-appellant to comply with the April 7, 1999 order).

Instead of appealing the April 1999 order, plaintiff-appellant challenged it in the Northern District of California, which dismissed the complaint as an improper collateral attack. (Appellant then appealed to the Ninth Circuit, which affirmed the Northern District's dismissal order.) Instead of appealing the October 2000 order, plaintiff-appellant paid the frozen funds, plus interest, into the district court's registry. Under the doctrine of res judicata, the court is bound by those final decisions. *See Dynaquest Corp. v. U.S. Postal Serv.,* 242 F.3d 1070 (D.C. Cir. 2001) (citing *Allen v. McCurry,* 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.")).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/s/ DZS
/s/ KLH
/s/ MG

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

EDWARD O.C. ORD, Plaintiff, vs. SECURITIES & EXCHANGE COMMISSION; and UNITED STATES OF AMERICA, Defendants.	)	01CV02165 (EGS)

JUDGMENT

(Filed Sep. 17, 2003)

Defendants Securities & Exchange Commission and the United States of America filed a motion for summary judgment. The motion was opposed by plaintiff Edward O.C. Ord. After the Court had read and considered the papers filed with regard to defendants' motion for summary judgment, on March 21, 2003, the Court issued a decision granting defendants' motion.

IT IS ORDERED AND ADJUDGED that plaintiff Edward O.C. Ord take nothing by way of his complaint, and judgment is entered in favor of defendants Securities & Exchange Commission and the United States of America.

Done this 16th day of ~~August~~ Sept., 2003, at Washington, D.C.

/s/ [Illegible]
Honorable Emmet G. Sullivan

Approved as to form:

/s/ Roscoe C. Howard, Jr. [Illegible]
ROSCOE C. HOWARD, JR., D.C. Bar # 246470
United States Attorney

/s/ Mark E. Nagle [Illegible]
MARK E. NAGLE, D.C. Bar # 416364
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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD O. C. ORD, Plaintiff, v. SECURITIES & EXCHANGE COMMISSION, et al., Defendants.	Civil Action No. 01-2165 (EGS) [10]

ORDER

Upon consideration of defendants' joint motion for summary judgment, the response and reply thereto, and the relevant case and statutory law governing the issues, and substantially for the reasons advanced by defendants and outlined herein, it is by the Court hereby

ORDERED that defendants' motion is GRANTED; and it is

FURTHER ORDERED that plaintiff's case is DISMISSED with prejudice.

As a threshold matter, and in light of the fact that sovereign immunity has not been waived in this case, this Court lacks subject matter jurisdiction over plaintiff's complaint. See United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767 (1941). Sovereign immunity is not waived by the federal question statute, 28 U.S.C. § 1331, see, e.g., Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1385 (D.C. Cir. 1989), the Declaratory Judgment Act, 28 U.S.C. § 2201, see, e.g., Morgantown Glassware Guild v.

Humphrey, 236 F.2d 670, 672 (D.C. Cir. 1956), or the Administrative Procedure Act, 5 U.S.C. 551 et seq., see, e.g., Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999).

Moreover, plaintiff waived his right to raise challenges to this Court's 1994 orders by failing to appeal them in the original case of SEC v. Banner Fund Int'l, 211 F.3d 602 (D.C. Cir. 2000). Plaintiff is precluded from re-litigating those issues in accordance with the doctrine of res judicata. This Court, or the United States Court of Appeals for the D.C. Circuit, in the original Banner case, were the appropriate venues for resolving the challenges plaintiff now raises.

Finally, summary judgment is appropriate in this case because plaintiff's claims are meritless. This Court enjoyed personal jurisdiction over plaintiff in the Banner Fund case and plaintiff was bound by the Court's order freezing his assets. See Fed. R. Civ. P. 65(d) ("[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.") Furthermore, plaintiff clearly subjected himself to this Court's jurisdiction pursuant to the minimum contacts analysis articulated in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945). By failing to contest it in the first instance, plaintiff waived objection to personal jurisdiction. See, e.g. Porsche Cars North America Inc. v. Porsche.Net, 302 F.3d 248, 255 (4th Cir. 2002) (holding that personal jurisdiction is "indubitably waived" absent timely objection.") The Court retains

jurisdiction at this time to enforce its prior orders. See, e.g., SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998).

Defendants are correct in asserting that plaintiff had ample notice and opportunity to be heard and that he waived his impossibility argument by failing to raise it previously before this tribunal. See SEC v. Current Fin. Serv., Inc., 798 F. Supp. 802, 808 (D.D.C. 1992).

Date: March 21, 2003

Signed by: EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

Notice to:

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APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD O.C. ORD, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; SECURITIES AND EXCHANGE COMMISSION; JUDITH R. STARR, personally and as Assistant Chief Litigation Counsel of Securities and Exchange Commission, Defendants-Appellees.	No. 00-15081 D.C. No. CV-99-02731-MHP MEMORANDUM* (Filed May 8, 2001)

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted April 13, 2001**[1]
San Francisco, California

Before: BEEZER, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. r. App. P. 349a)(2).

[1] The Order to Show Cause entered on March 26, 2001, is quashed.

Plaintiff-Appellant Edward O.C. Ord, Esq. ("Ord") appeals the dismissal of his action. We have jurisdiction and AFFIRM.

First, the district court did not have jurisdiction to consider Ord's Federal Rule of Civil Procedure 60(b) motion for relief from the order ("April Order") issued by the United States District Court for the District of Columbia ("DC district court"). Rule 60(b) motions may be filed in either the district court which issued the judgment or order, or in a district court located in a district where the judgment or order has been registered for enforcement. *F.D.I.C. v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996). The April Order has not been registered for enforcement in the Northern District of California.[2]

Second, the district court properly dismissed Ord's independent action to set aside the April Order. We are reluctant to allow independent actions for relief from other courts' judgments or orders because of "considerations of comity and orderly administration of justice." *Lapin v. Shulton, Inc.*, 333 F.2d. 169, 172 (9th Cir. 1964).

> When a court entertains an independent action for relief from the final order of another court, it interferes with the usurps the power of the rendering court. . . . Although justice may occasionally demand that sort of interference, the

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[2] Ord cites *Hadden v. Rumsey Products, Inc.*, 196 F.2d 92 (2d Cir. 1952), for the proposition that a Rule 60(b) motion may be filed in *any* district court. The Second Circuit, however, specifically left unaddressed the issue "whether the Ohio judgment could properly be attacked by [Rule 60] motion in the New York court." *Id.* at 95. The court, instead, characterized the action as an independent action to obtain equitable relief from a judgment or order.

> identification of those rare situations is committed to the sound discretion of the district court.

Treadaway v. Acad. of Motion Picture Arts & Scis., 783 F.2d 1418, 1422 (9th Cir. 1986).

Ord argues that his independent action should not be characterized as simply a collateral attack on the DC district court's order. He contends that he not only seeks to have the April Order declared void, but also asks to have the Securities and Exchange Commission enjoined from enforcing the allegedly void April Order.

We look to the substance of the complaint to determine whether an action should be characterized as a collateral attack or as an entirely distinct action. *See Treadaway*, 783 F.2d at 1420-22. In *Treadaway*, we examined the complaint and held that "at the heart of the complaint is the request for a declaration that a prior order of the bankruptcy court is null and void." *Id.* at 1421. We affirmed that the district court had the discretion to dismiss the independent action for "considerations of comity and orderly administration of justice." *Id.* at 1421-22.

Similarly, the "heart" of Ord's complaint is a request for a declaration that the April Order issued by the DC court is void. The Northern District of California district court had the discretion to dismiss the action. The court did not abuse its discretion when it concluded that "[i]f Ord wants to take the D.C. court's order to task, he should seek relief in the D.C. court. He may not upset the principles of judicial comity, fairness and efficiency that underlie the basic rule against horizontal appeals."

AFFIRMED.

APPENDIX F

UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BANNER FUND INTERNATIONAL, ET AL. Defendants.	CIVIL ACTION NO. 94-0342 (EGS)

ORDER

(Filed Apr. 7, 1999)

Upon consideration of the motion of Plaintiff Securities and Exchange Commission for an Order Directing the Deposit of Previously Frozen Funds into Court Registry, the Commission's Reply Memorandum, and the fact that defendants have failed to 'file any opposition to the Plaintiff Securities and Exchange Commission's motion, it is hereby

ORDERED that the Motion for an Order Directing the Deposit of Previously Frozen Funds into Court Registry is GRANTED.

IT IS FURTHER ORDERED, that the Defendants and Relief Defendants shall partially satisfy their disgorgement obligations out of all funds previously frozen pursuant to this Court's Preliminary Injunction Order of March 7, 1994. The Financial Institutions and Brokerage Firms which have frozen funds pursuant to this Court's prior

Orders are hereby Ordered immediately to deposit such funds into the Court Registry.

IT IS FURTHER ORDERED, that Edward O. C. Ord shall immediately deposit the $99,985 he has been holding for the benefit of Swiss Trade & Commerce Trust Ltd. and Lloyd R. Winburn into the Court Registry.

IT IS FURTHER ORDERED, that NationsBank of Florida immediately deliver to the Clerk of the Court the 231 original checks and *money* orders it received for clearance on behalf of Swiss Trade & Commerce Trust Ltd. from the Century National Bank of Jamaica.

IT IS FURTHER ORDERED, that at such time as funds are deposited into the court Registry, the Defendants and Relief Defendants shall relinquish all legal and equitable right, title, and interest in those funds, and no part of such funds shall be returned to Defendants, Relief Defendants or their successors or assigns.

IT IS FURTHER ORDERED, that until further order of this Court, paragraphs V, VII, and VIII of the Preliminary Injunction entered March 7, 1994, shall remain in effect.

IT IS FURTHER ORDERED, that this Court shall retain jurisdiction of this matter for all purposes, including enforcement and implementation of this Order.

/s/ Emmet G. Sullivan
Emmet G. Sullivan

United States District Judge

Dated. 4/1/99

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Miami, FL 33133

El Dorado Bank
Attention: Robert Moorhouse
Vice-President of Central Services
2730 East Chapman Ave., Suite 101
Orange, CA 92859

Neches Federal Credit Union
Attention: Andrea Johnson
2239 Nall Street
Port Neches, TX 77651

Orchard Bank
Attention: Ms. Carlene Blaich
9400 SW Beaverton Hillsdale Hghwy
Beaverton, OR 97005

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BANNER FUND INTERNATIONAL, et al., Defendants.	Civil Action No. 94-0342 (EGS) [186-1] [186-2]

ORDER

(Filed Oct. 10, 2000)

Upon consideration of Edward O.C. Ord's motion to stay the Security and Exchange Commission's motion that the Court hold him in contempt of this Court's Order of April 7, 1999 [186-1], or in the alternative, for enlargement of time in which to oppose the Security and Exchange Commission's motion [186-2], the Security and Exchange Commission's opposition, and the parties' arguments in Court; it is hereby

ORDERED that Ord's motion to stay the Security and Exchange Commission's motion to hold him in contempt is **DENIED**; it is further

ORDERED that Ord shall respond to the Security and Exchange Commission's motion to hold him in contempt by no later than **November 10, 2000**; it is further

ORDERED that Ord shall deposit the $99,985 that he was ordered to immediately deposit into the Court

Registry in this Court's April 7, 1999 Order, in addition to any interest accrued, into the Court Registry by no later than **4:00 p.m. eastern standard time on October 16, 2000**; it is further

ORDERED that discovery shall be completed by no later than **January 10, 2001**; it is further

ORDERED that all motions shall be filed by no later than **February 9, 2001**; that all responses shall be filed by no later than **February 23, 2001**; and that all replies shall be filed by no later than **February 28, 2001.**

10/10/00 /s/ Emmet G. Sullivan
DATE UNITED STATES DISTRICT JUDGE

Notice to:

Judith R. Starr, Esquire
Assistant Chief Litigation Counsel
Security and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0808

Mark D. Colley, Esquire
Holland & Knight LLP
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Room 1825b